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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 356.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

PILLIOD LUMBER COMPANY,
Respondent.

On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT.

STATEMENT.

Jurisdiction.

This case is here on writ of certiorari, granted October 21, 1929, to review a decree of the Circuit Court of Appeals for the Sixth Circuit in favor of the taxpayer (R. 12) which reversed an order of the Board

of Tax Appeals (R. 10) and remanded the case for further proceedings in accordance with the opinion.

The opinion below is reported as *Pilliod Lumber Company v. Commissioner of Internal Revenue*, 33 Fed. (2d), 245.

QUESTIONS PRESENTED.

This case presents two questions of law.

First Question: Whether the return filed by the taxpayer, respondent, in March, 1919, for the year 1918, on the form prescribed by the Commissioner of Internal Revenue, known as "Form 1031T" (the so-called "Tentative Return") set running the five year period of limitation for the assessment of income tax prescribed by the Revenue Acts of 1918, 1921 and 1924.

Second Question: Whether the return subsequently filed by the taxpayer, respondent, (in May, 1919) on the other form prescribed by the Commissioner, known as "Form 1120" (the so-called "Complete Return"), was inoperative to set running the said period of limitation, because, when filed by the respondent, it was not verified; the verification having been subsequently, within said period, supplied, and the return having been treated and acted on by the Commissioner and the respondent in like manner as if the same had been verified when filed.

The determination of a deficiency was made October 25, 1925, (R. 8) more than six years after the filing of each return. No waiver or consent enlarging the time is involved.

Each question was raised in the respondent's appeal to the Board of Tax Appeals (R. 3-5). The facts were fully found by the Board with respect to each re-

turn (R. 7-8). The facts with regard to the return on Form 1031T (as well as with regard to the return on Form 1120) are stated in the opinion of the Circuit Court of Appeals (R. 12-13).

The Board decided both questions in favor of the Government (R. 9-10). Both questions were raised in the Circuit Court of Appeals by the assignment of errors (pars. I and II, R. 11).

The Circuit of Appeals did not pass on the first question but decided the second question in favor of the respondent (R. 12-15).

TABLE OF IMPORTANT DATES INVOLVED.

The taxpayer filed its return on Form 1031T and made estimated first quarterly payment of $1,000 (R. 7) on ..... March 14, 1919

The taxpayer filed a return (unverified) on Form 1120 (R. 8) ..... May 31, 1919

Affidavit of verification filed with Commissioner (R. 8) ..... September 17, 1923

Expiration of period of 5 years from date of filing Return on Form 1031T ..... March 14, 1924

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FACTS AS FOUND BY BOARD OF TAX APPEALS.

On March 14, 1919, respondent filed with the Collector a tentative return entitled "Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return" (R. 7).

This Return contained the following:

> "The amount stated below is remitted herewith in payment of not less than one fourth of the estimated amount of the income, war-profits and excess profits taxes for the year ended December 31, 1918.
>
> "An extension of 45 days in the time allowed for filing a completed return is requested.
> "It is not possible to file a completed return on or before March 15, 1919, for the following reasons:
>
> "Unable to execute and file a complete return.
> "Estimated amount of tax $4,000; amount of remittance herewith $1,000" (R. 7).

The above was the return on Form 1031T.

On May 31, 1919, respondent filed Form 1120. This was a document on which was printed

> "Corporation Income and profits tax for calendar year 1918."

Beneath the title appeared the words (typewritten)

> "The Pilliod Lumber Company, Swanton, Ohio."."

This return contained all the items of gross income, deductions, profits and other details required by the

statute and regulations, but it was not verified or signed by any one (R. 8).

From December 8 to December 13, 1921, the Commissioner, by his deputy or agent, investigated the respondent's liability and examined its books and records. The agent thereupon made a written report to the Commissioner which constituted an audit of the books for 1917, 1918 and 1919 (R. 8).

On September 17, 1923, at the request of the Commissioner, the respondent by its President and Treasurer, executed an affidavit which in substance was identical with the affidavit printed on Form 1120. In this affidavit these officers stated (R. 8):

> "We are unable to furnish duplicate signed report, being unable to locate copy, believing same to have been destroyed with other records."

It does not appear that (with the exception of the lack of verification) any question was raised as to the regularity or sufficiency of this return. At the time the affidavit was filed the Commissioner had nearly six months (until March 14, 1924) before the expiration of the 5 year period from the date of filing of the return on Form 1031T, and more than 8 months with respect to the return on Form 1120 in which to determine and assess the tax.

For all that appears the Commissioner took no action whatever until October 23, 1925, more than 18 months after the assessment was barred if the period expired—as contended by respondent—March 14, 1924; nearly 17 months if it expired—as alternatively contended—May 31, 1924.

Ruling of the Board of Tax Appeals.

The Board held that

> "The *paper* filed by the petitioner on March 14, 1919, in the nature of a request for an extension of time for filing a complete return * * * was certainly not such a return as the statute required." (R. 9.)

With respect to the return on Form 1120 it was ruled:

> "Under the circumstances—the Board is of the opinion that the Form 1120, filed May 31, 1919– was not *at that time* such a return as the revenue act of 1918 required should be made and filed" (R. 9.)

Ruling of the Circuit Court of Appeals.

The Court of Appeals after reciting (R. 12) that the respondent paid part of the tax when it filed the return on Form 1031T did not consider the first point further, but held, with respect to the return on Form 1120, (p. 14) that

> " * * * The purpose of this return is to put before the bureau, in detail, all the facts and figures leading to the computation of the proper tax; and where it appears, as here, that the paper was complete in all details except for the lack of the oath; that it was tendered to the collector and received and filed by him as the statutory return; that it was made the basis of an examination some two and a half years later by the bureau; that it was used by the bureau as the basis of computations and corrections in April, 1922, three years after its filing; and that seemingly no one ever noticed until four and a half years after its filing that no oath was endorsed upon it—under all these circum-

stances, we think it must be treated by the Government as such a 'return', as of its filing date, that the time for making assessment against the taxpayer then began to run."

And further, pp. 14-15,

"Further considerations may be noted: The antithesis of 'after the return was filed' of Sec. 277 is the 'failure to file a return' of sec. 278, which permits assessment 'at any time.' Where there has been, as here, such a filing of return that no one for some years discovers any defect, but the bureau and the taxpayer both act as if upon a due return, a congressional intent that a deficiency may be levied ten or twenty years later seems improbable.

"Again sec. 239 of the revenue act of 1918 requires three things in the return—gross income, deductions, oath. Each is as essential as the other; yet the omission of items of income or deductions would justify asking an amended return, not ignoring it as nonexistent."

While the reasoning of the Court below seems clear and convincing, it may be helpful to this Court, in connection with the principal point involved in No. 414, *White v. Hood Rubber Company*, to consider both questions involved at some length.

As these questions relate solely to the interpretation and construction of the exceedingly complex provisions of the Revenue Acts of 1918, 1921 and 1924 it seems necessary to analyze their relevant provisions and to quote them at some length.

SUMMARY OF ARGUMENT.

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I.

THE TAXPAYER'S RETURN ON FORM 1031T, FILED MARCH 14, 1919, UNDER THE REVENUE ACT OF 1918, SET RUNNING THE STATUTORY PERIOD OF LIMITATION OF FIVE YEARS WITHIN WHICH THE COMMISSIONER MIGHT ASSESS THE TAX AND THE COLLECTOR ENFORCE COLLECTION. 12

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(b) *The Act of 1918 further required that either the first installment, or, at the taxpayer's option, the whole tax, must be paid on or before March 15, 1919* 13

(c) *A penalty is prescribed for failure to pay the tax (or the quarterly installment) on or before March 15, 1919* 13

(d) *Additional heavy penalties are imposed for failure to file the return on or before March 15, 1919. If the failure is willful and the return false or fraudulent double penalties are imposed and liability incurred to fine and imprisonment.* 14

(e) *Form 1031T was the return which, in compliance with the statute, constituted notice and demand for the payment of the first installment on or before March 15, 1919. The taxpayer's estimate of the amount of its tax, inserted on this form, constituted notice of the amount due.* 15

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(f) *The law directed the Commissioner to prepare and make available to the taxpayers the form of return to be filed on or before March 15, 1919* 18

(g) *The Revenue Act of 1918 limited the period within which the Commissioner might assess the tax, and the Collector enforce collection, to five years from March 15, 1919* 19

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(b) *The Revenue Act of 1918 was kept alive by the Act of 1921, unless otherwise specifically provided, with respect to the assessment and collection of taxes due thereunder* 22

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"PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

"Sec. 277(a) Except as provided in section 278* . . . . . .

"(2) The amount of income * * * taxes imposed by * * * the Revenue Act of 1918 * * * shall be *assessed within five years after the return was filed*, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 278 . . . . . .

(d) *Where the assessment of the tax is made within the period prescribed in section 277* or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

*Other provisos not relevant.

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IV.

THE FAILURE OF THE TAXPAYER TO STATE IN THE RETURN FILED ON FORM 1031T THE ITEMS OF ITS GROSS INCOME, DEDUCTIONS AND CREDITS DOES NOT INVALIDATE THE RETURN, OR PREVENT THE RUNNING OF THE FIVE YEAR PERIOD FROM THE DATE OF ITS FILING 26

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ARGUMENT.

I.

THE TAXPAYER'S RETURN ON FORM 1031T FILED MARCH 14, 1919, UNDER THE REVENUE ACT OF 1918, SET RUNNING THE STATUTORY PERIOD OF LIMITATION OF FIVE YEARS WITHIN WHICH THE COMMISSIONER MIGHT ASSESS THE TAX AND THE COLLECTOR ENFORCE COLLECTION.

(a) *The Revenue Act of 1918, 40 Stat. chap. 18, pp. 1057-1082, effective February 24, 1919, specifically required that the taxpayer must file its return on or before March 15, 1919.*

Section 241(a) of that Act (40 Stat. 1082) provides:

> "That returns of corporations *shall** be made at the same time as is provided in subdivision (a) of section 227."

Section 227(a) (40 Stat. 1075) provides:

> "TIME AND PLACE FOR FILING RETURNS.
>
> "Sec. 227(a) That returns *shall* be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then *the return shall be made on or before the fifteenth day of March.* The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists *and shall keep a record of every such extension* and the reason therefor. Except in the case of taxpayers

*Italics supplied throughout except as otherwise indicated.

who are abroad, no such extension shall be for more than six months."

(b) *The Act of 1918 further required that either the first installment, or, at the taxpayer's option, the whole tax, must be paid on or before March 15, 1919.*

Section 250 (a) under the heading (40 Stat. 1082)

"PART IV.—ADMINISTRATIVE PROVISIONS"

provides:

"Sec. 250(a) That except as otherwise provided in this section * * * the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment *shall be paid at the time fixed by law for filing the return.* * * * Where an extension of time for filing a return is granted *the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension.* * * *

"The tax may at the option of the taxpayer be paid in a single payment instead of in installments, in which case the total amount shall be paid on or before the time fixed by law for filing the return, or, *where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension.*"

(c) *A penalty is prescribed for failure to pay the tax (or the quarterly installment) on or before March 15, 1919.*

Section 250(e) (40 Stat. 1083-1084) provides:

"Sec. 250(e) If any tax remains unpaid after the date when it is due and for ten days after notice and demand by the collector, then * * * there shall be added as part of the tax the sum of five per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due."

(d) *Additional heavy penalties are imposed for failure to file the return on or before March 15, 1919. If the failure is willful and the return false or fraudulent double penalties are imposed and liability incurred to fine and imprisonment.*

Section 253 (40 Stat. 1085) provides:

"PENALTIES

"Sec. 253. That any individual, *corporation* * * * required under this title (Title II, 'Income Tax,' Sections 200-261, 40 Stat, 1058-1088) * * * who fails to pay * * * any tax, to *make a return*, or to supply such information *at the time* or times *required under this title* shall be liable to a penalty of not more than $1,000. Any individual, *corporation* * * * or *any officer* or employee *of any corporation* * * * who willfully refuses to pay * * * such tax, *to make such return*, or to supply such information *at the time* or times *required under this title* * * * shall be guilty of a misdemeanor and shall be fined not more than $10,000. or imprisoned for not more than one year, or both, together with the costs of prosecution."

Section 1317 (40 Stat. 1146-1148) provides:

> "Sec. 1317. That sections * * * 3176 of the Revised Statutes * * * are hereby amended to read as follows:
>
> "Sec. 3176. * * *
>
> "In case of any failure to *make and file a return* * * * *within the time prescribed by law or prescribed by the Commissioner* * * * or the collector in pursuance of law, the Commissioner * * * shall add to the tax 25* per centum of its amount, except that *when a return is filed after such time* and it is shown that the failure to file it *was due to a reasonable cause* and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return is willfully made the Commissioner * * * shall add to the tax 50 per centum of its amount."

(e) *Form 1031T was the return which, in compliance with the statute, constituted notice and demand for the payment of the first installment on or before March 15, 1919. The taxpayer's estimate of the amount of its tax, inserted on this form, constituted notice of the amount due.*

Section 250(e) (40 Stat. 1084) further provides:

> "In the case of the first installment provided for in subdivision (a) the instructions *printed on the return* shall be deemed sufficient notice *of the date when the tax is due* and sufficient demand and *the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due.*"

*50 per centum in R. S. 3176.

In the instant case such instructions were printed on Form 1031T and in this respect the return fully complied with the statute.

Form 1031T, as furnished to the taxpayers by the Commissioner, was printed on two sheets. "Original" and "Duplicate." Both sheets were to be filled in by the taxpayer and filed with the Collector accompanied by remittance of at least one quarter of the estimated tax on or before March 15, 1919.

The Collector was to sign the extension of time on the duplicate and return it to the taxpayer.

All these steps were taken in the instant case.

The following appeared on the "Original" but not on the "Duplicate."

> "Original. This form with duplicate and remittance covering one fourth of estimated tax must reach Collector's office on or before March 15, 1919."

In No. 414, *White v. Hood Rubber Co.*, the duplicate return on form 1031T is annexed to the declaration as Exhibit "A" (R. 8-10). In the instant case it is submitted that the Court will take judicial notice of the form of the return as promulgated by the Commissioner. In so far as relevant to this point it reads as follows quoted from the record in No. 414, p. 9 the form is here set forth in blank, the name of the collector, district, and amounts filled in in each case omitted. The filing of the return is found as a fact (R. 7) and part of the contents stated (*ibid*).

> (Duplicate)
> "This form duly approved by the Collector must accompany the taxpayer's complete return when filed.

"Penalties for making false or fraudulent return not exceeding $10,000, or not exceeding one year's imprisonment, or both, in the discretion of the court, and in addition 50 per cent of the tax evaded.

"For failing to make return on time: No more than $1,000. and in addition 25 per cent of the amount of tax due.

"Dated ....., 1919.

"Collector of Internal Revenue

"The amount stated below *is remitted herewith* in payment of not less than one-fourth of the estimated amount of the income * * * taxes for the year ended December 31, 1918, of the corporation.

"An extension of .... days in the time allowed for filing a completed return is requested.

"It is not possible to file a completed return on or before March 15, 1919, for the following reasons.

.....*

(R. 10) "Estimated amount of tax .....

Amount of remittance herewith .....

"Collector's Approval.

"In consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of tax, and for the reasons stated above, the time for filing the completed return * * * is hereby extended by authority of the Commissioner of Internal Revenue until ....., 1919.

"Dated ....., 1919.

.....

"Collector of Internal Revenue

District of .....

*Reasons inserted in the blank by the taxpayer.

(f) *The law directed the Commissioner to prepare and make available to the taxpayers the form of return to be filed on or before March 15, 1919.*

Section 1305 (40 Stat. 1142) provides:

> "Sec. 1305. That *all administrative* * * * *provisions of law* including the law relating to the assessment of taxes are hereby extended to and *made a part of this Act* and every person liable to any tax imposed by this Act, or for the collection thereof *shall* * * * *render, under oath, such* statements and *returns, and shall comply with such regulations* as the Commissioner, with the approval of the Secretary, *may from time to time prescribe.*
>
> * * * * * * * * * *
>
> "The Commissioner, for the purpose of ascertaining the correctness of any return or *for the purpose of making a return where none has been made, is hereby authorized,* * * * to examine any books, papers, records or memoranda *bearing upon the matters required to be included in the return,* * * *."

Section 1309 (40 Stat. 1143) provides:

> "Sec. 1309. That the Commissioner, with the approval of the Secretary, is hereby autnorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

Section 321 of the Revised Statutes (incorporated by section 1305 of the Act of 1918, quoted above) codified, without substantial change, U. S. Code of Laws, Title 26, Section 2) provides:

> "The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury,

> shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and *shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue* * * *."

(g) *The Revenue Act of 1918 limited the period within which the Commissioner might assess the tax, and the Collector enforce collection, to five years from March 15, 1919.*

Section 250(d) (40 Stat. 1083, "Part IV, Administrative Provisions") provides:

> "Sec. 250(d). *Except in the case of false or fraudulent returns made with intent to evade the tax,* the amount of tax due under any return shall be determined and assessed by the Commissioner within *five years after the return was due or was made* and no suit or proceeding for the collection of any tax shall be begun after the expiration of *five years after the date when the return was due or was made.* In the case of false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

From the above quoted provisions of the Revenue Act of 1918, the following propositions are clearly deducible.

1. The law required the payment of the first installment and the filing of the return on or before March 15, 1919. (Sec. 227a, *supra,* p. 12; Sec. 250a, *supra,* p. 13.)

2. The law directed the Commissioner to prescribe the form of the return to be filed on or before March

15, 1919, by the taxpayer. (Sec. 1305, *supra*, p. 20; R. S. Sec. 321, *supra*, p. 18.)

3. The law required the taxpayer to make its return on the form so prescribed, and hence prohibited the use of any other form. (Sec. 1305, *supra*, p. 18.)

4. The taxpayer made the return on the prescribed form, 1031T, filed it before the last day fixed by law, March 15, 1919, namely on March 14, 1919, and at the same time, as required by law, paid the first installment of the estimated amount of tax.

5. Had the taxpayer failed to file the return on form 1031T, on or before March 15, 1919, it would have been subject to a penalty of $1,000 and in addition of 25 per cent of the amount due. Had the refusal been willful the taxpayer corporation would have been subject to a fine of not over $10,000, or its officers would have been subject to a fine in like amount or to imprisonment for not more than one year or to both such fine and imprisonment. A like penalty and like liability to punishment would have followed willful failure to pay the tax on that date (Sec. 253, *supra*, p. 14.) A like liability to punishment and an additional penalty of 25 per cent of the tax evaded would have followed the willful making of a false or fraudulent return. (Sec. 1317 amending R. S. 3176, *supra*, p. 15.)

6. The return filed on form 1031T did not have the legal effect of a mere extension of time for filing the return under Section 250(a), *supra*, p. 13 and Section 227(a) (*supra*, p. 12), because (1) it was filed as a return and the estimated tax was paid; (2), *the time for payment of the first installment was not postponed until the date of the expiration of the period of extension for filing the return.*

7. The return on Form 1031T was the return contemplated by the Revenue Act of 1918, the filing of which set running the 5 year period of limitation. It was the statutory "return" for all the purposes contemplated and specified in the statute.

8. The return on Form 1120 filed by the taxpayer on July 14, 1919, was not the "return" specified in the statute, for only one "return" is specified. It was, therefore, in the nature of a supplementary or amended return to the original return already filed. The Commissioner had authority to require it to be filed under Section 1305 of the Act (*supra*, p. 18). The filing of such further return did not affect the running of the statute of limitations from the date of filing of the original return, March 14, 1919.

II.

THE RETURN ON FORM 1031T, FILED BY THE TAXPAYER ON MARCH 14, 1919, WAS THE RETURN CONTEMPLATED IN THE FIVE YEAR PERIOD OF LIMITATION FOR ASSESSMENT AND COLLECTION PRESCRIBED IN THE REVENUE ACT OF 1921.

(a) *Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) provides, under "Part IV—Administrative Provisions," corresponding to the like numbered sections in the Act of 1918:*

> "Sec. 250 * * * (d) * * * the amount of any such (income, excess profits, etc.) taxes due * * * under prior income * * * tax acts * * * *shall be determined and assessed within five years after the return was filed** unless both the Commissioner and the taxpayer consent in writing to a later de-

*In Act of 1918, *supra* p. 19, "was due or was made."

termination, assessment and collection of the tax; and *no* suit or *proceeding for the collection of any* such taxes due under this Act or *under prior income* * * * *tax Acts shall be begun after the expiration of five* years after the date when such return was filed.'"*

(b) *The Revenue Act of 1918 was kept alive by the Act of 1921, unless otherwise specifically provided, with respect to the assessment and collection of taxes due thereunder.*

Section 1400 of the Revenue Act of 1921 (42 Stat. 227, chap. 136, November 23, 1921, 320-321) provides:

"REPEALS

"Sec. 1400(a) That the following parts of the Revenue Act of 1918 are repealed * * *

"Title II (called 'Income Tax'*) as of January 1, 1921.

* * * * * * * * * *

"(b) The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) *remain in force for the assessment and collection of all taxes* which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of *all penalties* and forfeitures *which have accrued* or may accrue *in relation to any such taxes.*"

The only relevant portion of the 1921 Act with respect to the assessment and collection of taxes under the Act of 1918 whereby it is "otherwise specifically provided" is the mere change of phrase above noted.

*Sections 200-261, (40 Stat. 1058-1088).

Under the Act of 1918 the tax must be determined and assessed (Sec. 250(d), *supra*, p. 19)

> "within five years after the return *was due or was made*"

and no proceeding for collection

> "shall be begun after the expiration of five years after the date when *the* return *was due or was made.*"

Under the Act of 1921 (Sec. 250(d) *supra*, p. 21) the amount of any tax due under the Act of 1918 shall be determined and assessed

> "within five years after the return was *filed*"

and no proceeding for collection

> "shall be begun after the expiration of five years after the date when *such* return was *filed.*"

The only change of any substance was the substitution of the phrase "was filed" for the phrase "was due or was made." "Filed" and "made" are clearly equivalent.

In the instant case the return was "filed" or "made" when (or before) it was "due", namely on March 14, 1919. It would be, therefore, superfluous to endeavor to ascertain whether the omission of the words "was due" is of legal significance. The omission clearly does not affect the rights of the taxpayer in the instant case.

It thus clearly appears that in so far as the rights of the taxpayer in the instant case are concerned, the

Act of 1921 kept in force the five year limitation of the period for determination, assessment and collection prescribed in the Act of 1918, and hence did not change the right of the taxpayer that such determination, assessment and beginning of proceedings for collection must all be within five years from March 14, 1919, the date of filing of the return.

(c) *Section 1400 of the Revenue Act of 1921 was not repealed by the Act of 1924.*

The Revenue Act of 1924 (43 Stat. 253, chap. 234, June 2, 1924), repeals in Section 1100 (43 Stat. 352) specified parts and sections of the Act of 1921. Section 1400 is not included in the parts and sections so repealed.

It follows that throughout the period from March 15, 1919, to October 23, 1925 (when the assessment in the instant case was made) the penalty provisions of the Act of 1918, above quoted (5 per cent penalty; 12 per cent interest for failure to pay on March 15, 1919; $1,000. penalty for failure to file return on March 15, 1919; Secs. 250(e) *supra*, p. 14; 253, *supra*, p. 14) remained in full force and effect.

There is nothing to indicate that the "return" the filing of which, under section 250(d) of the Act of 1921 (*supra*, p. 21), set running the five year period of limitation was any other return than that specified in the quoted sections of the Act of 1918 (*supra*, pp. 12-19). As pointed out that "return" was the one on form 1031T, due in all cases prior to March 15, 1919, and filed in the instant case on March 14, 1919.

III.

THE REVENUE ACT OF 1924 IN FORCE WHEN THE DETERMINATION WAS MADE, DID NOT EXTEND THE PERIOD FOR ASSESSMENT OF TAXES UNDER THE ACT OF 1918.

Sections 277 and 278 of the Act of 1924 (43 Stat. 299, 300), so far as relevant, provide, under the caption:

> "PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.
>
> "Sec. 277(a) Except as provided in section 278* * * *
>
> "(2) The amount of income * * * taxes imposed by * * * the Revenue Act of 1918 * * * shall be *assessed within five years after the return was filed*, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."
>
> "Sec. 278 * * *
>
> "(d) *Where the assessment of the tax is made within the period prescribed in section 277* or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

In the instant case the tax was *assessed* more than six years after the return on Form 1031T and the return on Form 1120 respectively were filed, long after the expiration of the period of five years prescribed in Section 277(a) of the Act of 1924.

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*Other provisoes not relevant.

The provisions in Section 278(d) therefore did not extend the time for enforcing the collection. It follows that Section 278(d) is inapplicable to the instant case.

It follows, as pointed out with respect to the Act of 1921 that the phrase "after the return was filed," in section 277(a) of the Act of 1924, connotes the same "return" as that specified in the quoted sections of the Act of 1918, namely, in the instant case, and in other similar cases, the return filed by the taxpayer on (or before) March 15, 1919, on form 1031T.

IV.

THE FAILURE OF THE TAXPAYER TO STATE IN THE RETURN FILED ON FORM 1031T THE ITEMS OF ITS GROSS INCOME, DEDUCTIONS AND CREDITS DOES NOT INVALIDATE THE RETURN, OR PREVENT THE RUNNING OF THE FIVE YEAR PERIOD FROM THE DATE OF ITS FILING.

Under the caption;

"CORPORATION RETURNS."

Section 239 of the Revenue Act of 1918 (40 Stat. 1081) provides:

> "That every corporation subject to taxation under this title (Title II, 'Income Tax', secs. 200-261) * * * shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to * * *."

In the instant case the return on form 1031T was sworn to. The items of gross income, deductions and

credits, were not inserted because the Commissioner, in the form which he prescribed, did not provide blanks for filling in, or otherwise require this information to be given.

The taxpayer was required under pain of heavy penalties to use and file the form of return prescribed and to pay at least one quarter of the estimated tax before the 15th of March. These requirements were fully met. The taxpayer did everything that was required—everything that it could do. It could not use any other form of return than the one prescribed and on that return it was not required to enter the items of gross income, deductions and credits.

The position now taken by the Government is that because the taxpayer failed to state items of gross income, deductions and credits, which the Commissioner did not require it to state, the return is a nullity and the assessment although made more than six years after the filing, was in time.

In other words the position is that the Commissioner had it in his power to extend the statutory period of limitation by failing to furnish a form of return such as would enable the taxpayer to comply with the statute and could require the taxpayer, in direct violation of the statute, to pay the tax on March 15th and make its return two months later.

To express the thought in another way, the date when the 5 year period of limitation should begin to run was wholly within the control of the Commissioner, and the statutory requirements that the return should be made and first installment paid on or before March 15th, and assessment made and collection begun within 5 years thereafter, were no protection to the taxpayer.

V.

THE FACT THAT THE COMMISSIONER LABELED THE RETURN ON FORM 1031T AS "TENTATIVE" AND THE RETURN ON FORM 1120 AS "COMPLETE" AND THAT HE EMBODIED IN FORM 1031T A REQUEST FOR EXTENSION OF TIME DID NOT IN ANY WAY AFFECT THE SPECIFIC PROVISIONS OF THE STATUTE WITH RESPECT TO THE FIVE YEAR PERIOD OF LIMITATION.

The Commissioner, as provided by the statute, has general power to make regulations and to prescribe forms for tax returns. In so far as these regulations are consistent with the statute, it is well settled that they have the force of law. In so far, however, as they are inconsistent with the statute it is equally well settled that they are void.

The provisions of the statute with regard to the period of limitation being clear and explicit, the Commissioner was without power by any regulation or ruling, or by the preparation of any form of tax return in any way to alter or affect the statute.

It is obvious that as Congress failed to pass the Revenue Act of 1918 until the 24th day of February, 1919, but required the taxpayers to file their returns on or before the 15th day of March 1919, the Commissioner was unable to prepare and issue forms for full and complete returns in time for the taxpayers to fill them out and file them with the Collector on or before the 15th day of March. Whether or not this situation was considered by Congress when the Act was passed, no provision whatsoever was made in the statute to meet this emergency. In the stress of war

conditions with the enormous war expenditures which were being made, it was essential for meeting the obligations incurred in connection with the prosecution of the war, that the date of payment of the income taxes should be fixed on the 15th of March, 1919. The only provision in the statute which authorizes the Commissioner to extend the time for filing the return was the provision above quoted p. 13, which required the Commissioner in such case to extend the time for the making of the first payment to the extended date of making the return. In such case the taxpayer was required to pay interest on the amount of the first payment from March 15, 1919, to the date of filing the return. No such extension was granted and no such extension was applied for. The taxpayer in the instant case, paid on March 14, 1919, when it filed its return, the sum of $1000. which was one-fourth of the estimated tax of $4000 (R. 7).

VI.

THE LACK OF VERIFICATION OF THE RETURN FILED BY RESPONDENT MAY 31, 1919, DID NOT, UPON THE FACTS FOUND BY THE BOARD OF TAX APPEALS, RENDER THAT RETURN INEFFECTIVE WITH RESPECT TO THE PERIOD OF LIMITATION.

If the first point is decided in favor of the taxpayer, respondent, this point does not require consideration. It is essentially an alternative point.

The opinion of the Circuit Court of Appeals (R. 13-15) is so clear and convincing that further argument may well be superfluous.

The question is closely similar to that involved in

the preceding points in the argument in discussing the return filed on Form 1031T.

The distinction between the two returns lies in the fact that with respect to Form 1031T the omission of the items of gross income, deductions and credits was brought about through the failure of the Commissioner to prescribe, as directed by the statute, a complete and comprehensive form. With respect to that return the taxpayer did all that the law and the regulations required. With respect to the return on Form 1120, the taxpayer was at fault. By inadvertence, apparently, the blank affidavit of verification at the foot of the return was not filled in.

But such omissions or irregularities are of frequent occurrence with respect to all manner of documents, even frequent in pleadings, and motions and occasional in judgments of the courts.

The statute does not provide that the 5 year period of limitation shall be set running by the filing of a "sworn" or "duly verified" return, but by the filing of a "*return.*"

The document filed was unquestionably a "return." The form was identical with that used by every other corporation for that year.

It was regarded as a return and so acted on by the Commisisoner. The taxpayer supplied the affidavit immediately upon request made, four and a half years after the return was filed.

The contention of the Government, upheld by the dissenting opinion of Judge Moorman, below, (R. 15-16) leads logically to the conclusion that in any case where a return filed by a taxpayer in good faith, is defective by the inadvertent omission of verification, the return is a nullity and the period of assessment is unlimited.

The contention of the Government necessarily results in one of two conclusions in the instant case; either (a) that the return is a nullity—as aptly said by Judge Denison (R. 15) "non-existent" or (b) that the period of limitation was set running by the filing of the affidavit of verification September 17, 1923 (R. 8, 13) as intimated by the Board (R. 9).

Either conclusion involves a disregard of the plain terms of the statutes.

> "within five years after the return was due or was made"

Act of 1918, Sec. 250(d) (40 Stat. 1083) *supra*, p. 19.

> "within five years after the return was filed"

Act of 1921, Sec. 250(d) (42 Stat. 265) *supra*, p. 21.
Act of 1924, Sec. 277(a) (43 Stat. 299) *supra*, p. 25.

The contention cannot be sustained except through "judicial legislation."

United States v. Standard Brewery Co., 261 U. S. 514, 519.

The statute does not say "a complete return" or "a return satisfactory in form to the Commissioner of Internal Revenue." In the opinion of the Board, the opinion of the Commissioner is made the criterion (R. 9). The statute does not say that assessment shall be made "within five years after all omissions or irregularities in the return shall have been supplied." But it says plainly and explicitly

> "within five years after the return was filed."

The series of Revenue Laws from 1918 to 1928 clearly connote that Congress had in mind defective or irregular returns.

See for example Sections 1305 and 1309 of the Act of 1918, *supra*, p. 18.

Obviously if Congress had intended that the 5 year period should be set running only when a "perfect" return was filed, apt words to that effect would have been used.

To illustrate by analogy. Is a declaration at law or a bill in equity *void* because demurrable, as not stating a cause of action? If a declaration or complaint, duly served, were subsequently held bad on demurrer, could it conceivably be held that suit was brought too late if an amended pleading were filed after the statute had run?

It was clearly the intention of Congress to allow the ample period of five years within which to examine the taxpayer's return, correct any mistakes or irregularities and take whatever proceedings might be needed to enable the Commissioner to compute and determine the correct amount of tax, and ascertain and fix, once and for all time, the liability of the taxpayer. It was provided in response to a most insistent public demand that there should be a limitation of time for assessment and collection.

Statutes of limitation of this type are favored by the law.

Wood v. Carpenter, 101 U. S. 35, 139;
United States v. Oregon Lumber., 260 U. S. 290, 299;
Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, 350;
Russell v. United States, 278 U. S. 181.

If there is any occasion for construction or any doubt on the subject, the construction in favor of the taxpayer should be adopted.

Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, and cases cited at 350.

CONCLUSION.

The decree of the Circuit Court of Appeals should be affirmed.

HERBERT W. NAUTS,
HENRY M. WARD,
Counsel for Respondent.

January, 1930.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 356.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

PILLIOD LUMBER COMPANY,
Respondent.

On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR RESPONDENT.

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REPLY BRIEF FOR RESPONDENT.

Pursuant to leave granted upon the argument the respondent calls attention to the following points.

I.

THE REGULATIONS IN FORCE IN MARCH, 1919, WHEN THE RETURN ON FORM 1031 T WAS FILED, REQUIRED THE TAXPAYERS TO USE THIS FORM.

This form was to be furnished in all cases to the taxpayer by the collector. If not, the taxpayer was required to obtain it from the collector.

The subject is covered by Regulations 45 Relating to the Income Tax and War Profits and Excess Profits Tax Under the Revenue Act of 1918.

Article 407 is explicit:

> "Article 407* **Use of prescribed forms.**—Copies of *the prescribed return forms* will so far as possible *be furnished taxpayers* by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with *the proper forms should make application therefor* to the collector in *ample time to have their returns* prepared, verified, and *filed* with the collector *on or before the last due date.* Each taxpayer should carefully prepare his return so as *fully and clearly set forth the data therein called for.* Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. *In lack of a prescribed form a statement* made by a taxpayer disclosing his gross income and the deductions therefrom *may be accepted as a tentative return,* and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form."

As stated on the argument in the instant case the taxpayer fully complied with this regulation and did:

> "prepare his return so as fully and clearly to set forth the data therein called for."

No data were required as to "items of gross income, deductions and profits," so none were given. The ultimate fact sought was the amount of tax payable.

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*Quoted also in Sol. Gen. brief, p. 4.

This amount was necessarily based by the taxpayer upon the above items as shown by its books and estimated at $4000. The correct amount proved to be only $3,626.46 (R. 13). The Government should not be permitted to take advantage of its own wrong in failing to provide in Form 1031T for the insertion of "items of gross income deductions and credits" and thus to lay a "trap for the unwary."

II.

THE COMMISSIONER ASSESSED THE TAX UPON LISTS FURNISHED BY THE COLLECTOR BASED, IN THE FIRST INSTANCE, ON THE TAXPAYER'S RETURN.

Article 1012 of Regulations 45 covers the topic of assessments and additional assessments, as follows:

> "Article 1012. **Assessment of tax.**—When the returns are received at the collectors' offices, they are examined and listed before being forwarded to the Commissioner. If it appears that the tax is greater or less than shown in the return, it is recomputed. After checking the figures *the Commissioner assesses the tax on the basis of the collectors' lists.* The collectors *then send out bills* for the taxes either *as computed by the taxpayer* or as recomputed. * * * *As soon as practicable* the returns are carefully *audited by accountants* in the office of the Commissioner at Washington, assisted where necessary by reports of the examination of taxpayers' books and records made by the revenue agents in the field. If *error in a return* is detected, the taxpayer is notified accordingly *and an additional assessment* is made against him or he is given the opportunity to file a claim for a refund, as the case may be. *Any assessment must be made* within five years

after the return was due or was made, except in the case of false or fraudulent returns with intent to invade the tax. See sections 228, 1305 and 1318 of the statute and articles 451 and 1711."

III.

THE COMMISSIONER AS FULLY AUTHORIZED BY THE STATUTE ASSERTED THE AUTHORITY TO PRESCRIBE THE FORM OF RETURNS AND TO REQUIRE ADDITIONAL OR SUPPLEMENTAL RETURNS TO BE FILED.

By Article 1711 of Regulations 45, this power is clearly asserted and Section 321 R. S. (among other existing laws) relied on. (See Respondent's brief pp. 18-19, for provisions of Act of 1918 and, Sec. 321 R. S.)

Article 1711 is as follows:

"Article 1711. **Aids to collection of tax.**—In collecting the income and war profits and excess profits taxes the Commissioner has *the benefit of all existing internal revenue laws.* In aid of the enforcement of the statute the Commissioner may require any person to keep specified records, *to render returns and statements as directed*, to submit himself and his books to examination, and to comply with such regulations as may be prescribed * * *."

IV.

THE COMMISSIONER DID NOT REQUIRE CORPORATION RETURNS IN ALL CASES TO BE VERIFIED BY THE OFFICERS SPECIFIED IN THE STATUTE.

Section 239 of the Act of 1918 (40 Stat. 1081) quoted in part at page 26 of respondents brief, requires that a corporation return

"Shall be sworn to by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer—"

The Commissioner did not insist on literal compliance with this provision but accepted returns verified by other officers sufficiently cognizant of the facts.

Article 443 of Regulations 45 provides:

"Article 443. **Extension of time by collector.**—It is important that the taxpayer render *before the return due date a return as complete and final as it is possible for him to prepare.* However, in cases of sickness or absence collectors are authorized to grant an extension of not exceeding 30 days, where in their judgment such further time is actually required for the making of an accurate return. See article 1002. The application for such extension must be made prior to the expiration of the period for which the extension is desired. *The absence or sickness of one or more officers of a corporation at the time the return is required to be filed* will not be accepted as a reasonable cause for failure to file the return within the prescribed time, *unless* it is satisfactorily shown that *there were no other principal officers available* and *sufficiently informed as to the affairs of the corporation to make and verify the return.*"

V.

THE AUTHORITIES CITED BY THE SOLICITOR GENERAL ARE EITHER NOT IN POINT, CLEARLY DISTINGUISHABLE; OR WHERE ANALYSED, IN FAVOR OF THE RESPONDENT.

1. *Utah Power & Light Co. v. United States,* 243 U. S. 389, 409; (Sol. Gen. brief, p. 21). In this case the Power Company wholly disregarded the statute and regulations on which their asserted rights might have been founded and (p. 410)